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In the Supreme Court of the United States

OCTOBER TERM, 1953

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Petitioners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Respondents.

No. 441

MEREDITH H. MATHEWS, HENRY CROCKER and J. S. FARLEY & CO., INC.,

Petitioners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Respondents.

No. 443

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

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In the Supreme Court of the United States

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THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 441
MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 463

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

These petitions ask virtually unprecedented certiorari relief. They ask this Court again to review the identical record which was before it in Nos. 150 and 160 of last term save only that the Court of Appeals has again considered petitioners' claims and again concluded they are without merit. Not once in recent years and seldom if ever in its history has this Court, at succeeding terms and on the same record, issued writs of certiorari in the same case to hear the same questions. There is no reason to do so now.

The Court heard the case on the merits in December, 1952. It left undisturbed the judgment that petitioners take nothing but vacated the order below denying the applications for rehearing, directed the Court of Appeals to establish appropriate procedures for considering petitions for rehearing and rehearing in banc, and instructed that court to allow petitioners to take advantage of the new procedure. All this has been done. The rules below have been amended in accordance with the mandate of this Court; under the amended rules the Court of Appeals in banc has referred the rehearing applications to the Division; the Division has given careful consideration to the suggestions for rehearing and rehearing in banc and denied both. In respondents' judgment this litigation should now be at an end.

OPINIONS BELOW

The District Court opinion is reported at 85 F. Supp. 868. The Court of Appeals opinion on the merits is reported at 197 F.2d 994, and on the rehearing problem at 197 F.2d 1012. This Court's opinion is reported at 345 U.S. 247. The amendment by the Court of Appeals of its rule in accordance with the mandate of this Court appears at 205 F.2d 374, where the in banc order of the Court of Appeals referring the rehearing application to the Division is reported. The opinion of the Division denying the rehearing applications is reported at 206 F.2d 495.

JURISDICTION

The order of the Court of Appeals under the amended rules denying petitioners' application for rehearing and rehearing in banc was entered August 20, 1953. The petitions for writ of certiorari were filed October 26 and

November 12, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The case no longer presents a problem of Court of Appeals rehearing procedure.[1] With that single exception the questions presented are the identical questions presented last term, that is:

1. Does a holding company, whose stock interest in an operating railroad company has been lost by judicial decree confirming a plan for reorganizing the railroad company, have a right in equity to be paid, at the expense of unpaid secured creditors of such subsidiary, for the reduction of the taxes of the reorganization trustees of the railroad company resulting from the entry of the holding company's loss as a deduction in consolidated federal income tax returns, in repudiation of the holding company's own practice in tax dealings with its former subsidiary, and notwithstanding that the holding company suffered no loss or damage through the entry of its loss in the tax returns?

2. Has such claim of the holding company been lost through failure to present it to the bankruptcy court in the course of the reorganization proceeding?

STATUTES INVOLVED

The consolidated returns were filed under Section 141 of the Internal Revenue Code. The stock loss deduction is authorized by Section 23(g)(4) of the Code, enacted in October, 1942.

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[1]See also *Bradley Mining Co. v. Boice*, No. 321, October Term, 1953, certiorari denied Nov. 9, 1953.

STATEMENT

The petitions distort the facts, returning to the implications of wrongdoing repeatedly urged and repeatedly rejected, most recently in the Court of Appeals opinion of August 20, 1953 (R. 2370):

> "It must be borne in mind that all the transactions were open and aboveboard and were carried on in plain sight of all concerned; that there was no fraud, deceit, unfairness, or overreaching; that the consolidated return was filed by appellant's president in accordance with the practice of previous years; that the general counsel for appellant, who is of counsel for that party in this proceeding, recommended the employment of the tax counsel who conceived the idea of including appellant's stock loss in the consolidated return and called the attention of appellee's predecessor to the tax advantage."

The District Court reached the same conclusion (R. 274, 971), a conclusion confirmed by the Court of Appeals in its first opinion (R. 2219, 2226-7, 2234-5). There is no dissent on this point (345 U.S. 277). The tax transactions were honest, open and candid. This has been settled by the courts and it is demonstrated by the record.[2]

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[2]The petitioner Corporation charges that the tax result was accomplished "by respondent's taking over and managing petitioner's affairs for respondent's own benefit" (p. 5); but the court below said "The filing of these returns was in exact conformity with the practice followed since 1916" (R. 2224). The Corporation says that tax counsel for the trustees prepared "all the operative documents" (p. 5); the fact is that most of the tax returns were prepared in the office of the Corporation itself (R. 829-30, 844-6, 1258-9, 1414). The Corporation says that its president, Mr. Curry, was "a sort of figurehead" (p. 6); the trial court, *after* hearing him testify, described Mr. Curry as "a perfectly competent man, independent, and probably a pretty good railroad man" (R. 785). The Corporation claims that its board

From 1916 until April 30, 1944 the petitioner, The Western Pacific Railroad Corporation (the "Corporation"), owned all the stock of the pre-reorganization The Western Pacific Railroad Company, the predecessor in interest of respondent, the reorganized "Company". In 1935 the Corporation directed its subsidiary to file a petition for reorganization (230 I.C.C. 61) whereupon the railroad properties were transferred to reorganization trustees who owned and operated them until December 31, 1944, a period

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members were clerks (p. 6); the board members included, however, Thomas M. Schumacher, for many years chief executive of the Western Pacific system (R. 1719, 1724), characterized by counsel for petitioners as a person "of great ability and great honesty of character" (R. 993); Willis D. Wood, a past governor of the New York Stock Exchange (R. 1122); A. Perry Osborn, an experienced New York lawyer who, until his death, was of counsel for petitioners in this case and who came to the board at the suggestion of the Chase National Bank (p. 990); and H. Brua Campbell, a member of the New York law firm of Pierce & Greer, the firm representing the Corporation in this action. The Corporation says that the trial court concluded that the trustees controlled the Corporation directors (p. 35); but the Corporation itself in answering the complaint in intervention denied all allegations of domination and control (R. 156); the Corporation officers denied all such charges (R. 743-4, 1011-16, 1046, 1126, 1136, 1143); and the trial court refused to make a finding of domination (R. 462-86, 276).

The petitioning interveners charge that the respondent avoided its tax obligations "by causing plaintiff to file consolidated returns" (p. 4); the court below, however, pointed out that the returns were filed "in exact conformity with the practice followed since 1916" (R. 2224). The petitioners repeat the charge that Mr. Curry, the Corporation president, was a mere "signing officer" (p. 6); the trial court characterized Mr. Curry as "independent" and "competent" (R. 785). The petitioners complain of pay to the Corporation officers by the trustees (p. 7); when the trustees undertook to pay all the New York expense in the latter part of the trusteeship, they did so only because the Corporation, finding itself without funds (R. 789-90, 1243-4), repeatedly requested that this arrangement be made (R. 790, 1244, 1257, 1839, 1845, 1852-3). The petitioners say the Corporation lacked tax information (p. 7); but the Corporation president and its lawyer received an oral report from tax counsel (R. 839, 1079-80), a written report (Ex. P 50, R. 1757), the annual reports of the trustees discussing tax

of more than nine years. The plan of reorganization formulated by the Interstate Commerce Commission (230 I.C.C. 61, 233 I.C.C. 409) limited the first mortgage bonds of the reorganized company to $10,000,000 to be exchanged for trustees' certificates (Par. O, 233 I.C.C. 451). The old first mortgage bondholders received income bonds, preferred and common stock. Junior secured interests were not paid by at least $3,495,900, plus interest (R. 1220-2, 2021), and the new securities issued to the old bondholders have not had, generally speaking, the value assigned to them in the plan.[3] The plan declared the stock interest in and all un-

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problems (Ex. 20 B, 20 C, R. 511-14, 1279) and notice of the hearing held by the reorganization court to review the tax situation and establish a tax reserve (R. 1991, 703, 1085), and a copy of the order establishing the reserve (R. 1216, 1991, 703, 1085). Petitioners assert that the 1943 returns were prepared by respondent's employees (p. 8); they were in fact prepared in the Corporation office (R. 1414, 829-30, 844-6, 1258-9) by the same personnel who had prepared the returns in prior years (R. 1414-7) and signed by the Corporation president (R. 663-6, 831, 837), who had handled tax matters for the group for many years (R. 841-5) and who, thoroughly understanding the tax situation, had written to the Corporation's lawyer explaining it (Ex. In. 5, R. 2125). Petitioners say that the Corporation's president signed the returns "without consulting plaintiff's board of directors" (p. 8), but it had never been the practice for the board to see or approve the returns (R. 846). The petitioners assert that the settlement with the Government was made "without advance approval by plaintiff's board" (p. 8); they neglect to point out that the Corporation had received notice of the proposed settlement two months before it was accomplished (R. 669, 1788), that during that period the directors had considered the matter at length and decided against withdrawal of the offer of settlement (R. 1644-5), that they approved the settlement by formal action (R. 1103, 1644-5) and that the Corporation had been emphatic in saying both before and after this litigation began that tax counsel handled the tax transactions in a thoroughly satisfactory fashion (R. 1103-4).

[3]The plan assigned a value of $100 per share to the preferred stock and $57 and $62 per share to the common stock (233 I.C.C. 452) of the reorganized company. The price range of these stocks

secured claims against the debtor to be valueless (Par. P. (5), 233 I.C.C. 452). On March 15, 1943 the reorganization plan was approved by this Court (*Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, affirming *In re Western Pacific R. Co.*, 34 F. Supp. 493). In October, 1943 the plan was confirmed by the District Court (R. 496, 1674); on December 31, 1944 the railroad properties were returned to the reorganized company, the respondent here (R. 499, 1711, 36-108); and the reorganization proceeding was closed by a final order dated March 28, 1946 (R. 1219, 2013).

Each year beginning in 1918 the Corporation prepared, signed and filed consolidated tax returns for itself and all group members (R. 1258-9; R. 843-4). Each year the tax owing under the returns was allocated among the group members according to the formula universally accepted, that is: the consolidated return tax was distributed pro rata to those members of the group having taxable incomes in direct proportion to their several taxable incomes. No tax was allocated to a "loss company" and no payment was made to any such company for taxes "saved" through the entry of its loss in the returns (R. 1262).

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on the New York stock exchange is as follows for the periods indicated:

Year	Common		Preferred	
	High	Low	High	Low
1945	57⅛	30½	92	64¼
1946	56½	27	101	71
1947	42¼	26½	90	65
1948	36½	25½	74½	58¼
1949	30	20	70¼	53¾
1950	55	28	89	64½
1951	58¾	46½	94¼	84¼
1952	64½	46½	98	89
*1953	67⅜	46½	99¼	90

*To Oct. 31, 1953.

This practice continued during the reorganization. The group had no taxable income from 1935 through 1941 and no tax was paid (R. 1552, 2040). In 1942 and subsequent years the trustees had substantial income which, if consolidated returns were filed (Regs. 104, Sec. 33.31(f)), could be offset in part by loss carry-overs and carry-backs belonging to the trustees (R. 591, 921, 1759). For this and other reasons consolidated returns were obviously advantageous and such returns were filed for 1942, 1943 and the first four months of 1944, during which the group affiliation continued.

The 1942 returns reported a tax of $4,201,821.54 (R. 172). With insignificant exceptions the tax resulted from trustee income and it was paid by the trustees from the bankruptcy estate (R. 169, 824, 826, 1306-7). The order confirming the plan of reorganization (R. 496, 1674) became final in November, 1943 and the Corporation's stock loss was, for tax purposes, then realized (R. 606-8, 1409-10). Since this loss plus trustee carry-overs greatly exceeded trustee income the 1943 returns reported a large operating loss and no tax owing (R. 172). Under the appropriate provisions of the Internal Revenue Code, the loss was carried over to the first four months of 1944 and no tax was reported for that period. In March, 1945 the Corporation, as agent for the affiliated group (Regs. 104, Sec. 23.12), filed a claim for refund of the 1942 taxes paid by the trustees. The refund claim was based on a carry-back of a part of the 1943 loss (R. 492, 1654).

The tax liability of the Western Pacific Group for 1942, 1943 and the first four months of 1944, was settled with the Government in August, 1947. The 1942 refund claim for $4,201,821.54 was denied and the returns were accepted as filed (R. 168-173).

During the years here in question, 1942, 1943 and 1944, the Corporation had no income and the 1943 loss had, therefore, no tax utility to the Corporation itself.

Beginning on December 11, 1939, and continuously thereafter, the Corporation was a party to the reorganization proceeding (R. 1217, 1994, 1600-3). The Corporation at no time suggested, however, that it had a claim against the trustees on account of tax savings—and this even though the last of the tax returns was filed July 15, 1945 (Ex. P. 5A/B, R. 492), nine months before the reorganization proceeding closed on March 28, 1946 (R. 1219, 2013) and even though one important reason, expressly stated, why the reorganization proceeding remained open after the properties were returned to the reorganized company was to permit the bankruptcy court to hear and consider claims against its trustees (R. 62).

The complaint in this action was filed October 10, 1946 (R. 5, 11), six months after the final decree of the bankruptcy court. As a practical matter, however, the litigation began when the petitioning stockholders acquired a small portion of the preferred stock of the Corporation at nominal prices (R. 1147-55, 1642-3, 1905-7, 2102) and in June, 1946, brought a stockholders' suit in New York against the officers of the Corporation (R. 147) charging, among other things, failure to protect the Corporation in connection with the consolidated returns. Three months later this action was filed (R. 5, 11) and in due course the stockholders intervened (R. 121-55).

The District Court, following elaborate discovery proceedings and an extensive trial, gave judgment for respondents (R. 258, 320). On appeal the judgment was affirmed, Judge Fee dissenting (R. 2214). Petitions for rehearing and

for rehearing in banc were filed with the Court of Appeals. The application for rehearing was denied (R. 2259-60). The petition for rehearing in banc was stricken as being unauthorized by law or by the rules of court (R. 2260). A petition to file a motion to reinstate the petition for rehearing in banc (R. 2267) was denied by six of the seven Circuit Judges, Judge Denman dissenting (R. 2288, 2313). Petitions for certiorari were filed with this Court and granted (344 U.S. 809). The case was briefed and argued at length. In due course this Court filed its opinions and issued its mandate leaving undisturbed the judgment for respondents on the merits but vacating the orders denying the petitions for rehearing (R. 2321). Upon return of the mandate the Court of Appeals amended its rules (R. 2353) and the requests for rehearing and rehearing in banc were renewed (R. 2325, 2339). The court in banc referred these requests to the Division (R. 2354) where they were there denied (R. 2363). Petitioners now ask for writs of certiorari to the Court of Appeals.

ARGUMENT

The question now is this. Should the Court twice hear this case? Should it hear again on the identical record the identical arguments heard at length last term? Should it permit petitioners to prolong this litigation, now in the courts seven years, by allowing them once more to present claims already presented in three courts and nowhere approved? Respondents think not. Defendants as well as plaintiffs have their rights. When a claim has been fully considered and duly and regularly rejected the defendant is entitled to go free of it. Respondents respectfully ask the Court to bring this litigation to an end.

In the judgment of respondents the request for a second certiorari is both an unreasonable insistence on a meritless claim and an unreasonable demand on the time of the Court. Last term in this case the Court read lengthy briefs, heard three hours of argument relating almost entirely to the merits of the claim and prepared extensive opinions. The opinion announced for the Court was confined entirely to procedural matters. Apparently, therefore, the Court either found no error in the record other than procedural error (now corrected) or concluded that the case, procedural matters aside, is one for decision by the Court of Appeals. In either event, these applications for certiorari should be denied. If the decision below is right, it requires no further review; if the case is properly for Court of Appeals decision, that decision has been made.

1. This Is Not a Case for a Second Certiorari.

For this Court to consider and if need be correct the rehearing procedures of the Court of Appeals is, of course, an appropriate exercise of its supervisory powers over the affairs of the Federal courts. But this has now been accomplished and in no other aspect is this case appropriate for certiorari. The facts, according to Chief Justice Vinson, are "complicated" and "unique" (345 U.S. 249), a characterization with which petitioners agree (the Corporation's 1952 Reply Brief, p. 2). According to Mr. Justice Jackson, the case "is so unique that it is without precedent and it is likely to be without progeny" (345 U.S. 275). Federal jurisdiction rests here solely on diversity (345 U.S. 249, 275) and the claim depends on common law theories of unjust enrichment (345 U.S. 249, 276). It is difficult to see why

this Court should undertake to write unjust enrichment law for the courts of California or New York. On more than one occasion the Court has refused to determine state law which could more appropriately be determined elsewhere. See, for example, *Gardner v. New Jersey*, 329 U.S. 565 (1947); *Busby v. Electrical Utilities Employees Union*, 323 U.S. 72 (1944).

The case, it is true, deals with taxes and tax problems, but under the special circumstances here presented this is a reason against, rather than for, Supreme Court consideration. Tax law as written here is law for the entire country. It seems evident, therefore, that if possible this Court should make its tax decisions in cases in which the Government participates. Petitioners, for example, contend that the use of a loss in a consolidated return, with the consequent saving of taxes, entitles the loss company to compensation. The Treasury has proceeded on the contrary assumption in allocating consolidated excess profits tax to provide deductions from normal tax net income (T.D. 5086), in determining earnings and profits available for dividends (I.T. 3637, I.T. 4085) and in computing the basis upon which a parent holds stock of a subsidiary (Regs. 104, Sec. 23.34(c)). If petitioners are right the Treasury is wrong. But the Treasury is not here. In similar fashion, if petitioners are right the Securities and Exchange Commission is wrong. Its Rule U-45(b)(6) requires public utility holding companies to follow the identical practice which petitioners attack.[4] But the Commission, like the

[4]The S.E.C. has recently asked for comment on a proposed modification to Rule U-45(b)(6) but the suggested change does not support petitioners' position. The proposed modification would distribute the consolidated tax, as heretofore, to the group members

Treasury, is not before the Court. Congress will not permit the courts to hear an attack upon its legislation in the absence of the Attorney General (28 U.S.C. 2284(2)). A comparable policy is appropriate here. One of the important reasons why this Court controls its own docket is to avoid the very situation which petitioners seek to create.

These considerations against a new certiorari—the demand on the Court's time twice to hear the same case, the fact that the law problems are problems of local law, the absence of the Treasury and S.E.C.—are genuine and important. They are not necessarily conclusive, however, and cases could undoubtedly arise in which they would not be controlling. But this is not such a case.

2. The Petitions Present No Valid Reason for a Second Certiorari.

The petitions quarrel with the phrasing of the opinions below but they present no reason for believing that this case (with the rehearing problem solved) meets certiorari requirements. A "unique" case (345 U.S. 249, 275) does not, almost by definition, present an "important question" (Rule 38(5)(b)). A claim based upon local law of unjust enrichment (345 U.S. 249, 276) raises no federal question (Rule 38(5)(b)) and petitioners did not invoke the federal question jurisdiction of the District Court (R. 6, 124). A case "without precedent" (345 U.S. 275) can hardly conflict with other decisions of the state or federal courts (Rule 38(5)(b)) and the fact is that the decision below is in strict

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having income and, as heretofore, without tax saving payments; in computing the income position of each company, however, dividends received from group members would be excluded. It is reported that two Federal commissions and eight state commissions have recorded opposition to any change whatever in the rule. 52 *Public Utilities Fortnightly* 473.

accordance with the practice of the business community (*S.E.C.* Accounting Release No. 53, dated Nov. 16, 1945) and all the relevant rulings and precedents. See, for the rule of the *S.E.C.*, Rule U-45(b)(6); for the *Treasury* rulings, T.D. 5086, I.T. 3637, I.T. 4085; for the views of the *Federal Trade Commission*, Sen. Doc. No. 92, Part 72-A, 70th Cong. 1st Sess., p. 478; for the views of the *Interstate Commerce Commission*, the decisions in *Central of Georgia Railway Co. Reorganization*, 252 I.C.C. 587, 600 (1942) and *St. Louis-San Francisco Railway Co. Reorganization*, 257 I.C.C. 399, 410 (1944); and for the views of *Congress*, the *Hearings before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. on S. 1725, p. 255. Where, then, is the ground for certiorari?

The petitions seek to create that ground by a contention that the Court of Appeals decided tax law questions and decided them erroneously. The argument is that the court below held that the Revenue Acts obligated the Corporation to join in the returns. There was no such ruling. The court said (R. 2229-30):

> "The Code and Regulations recognize that the benefit of the consolidated returns is for all corporations in the group. Any subsidiary in the group, as well as the parent, may prevent the filing of consolidated returns if the filing is detrimental or contrary to the interests of such corporation."

There is here no suggestion that the *Revenue Acts* create an obligation to sign the returns. The obligation existed, but it arose, as the court clearly held, out of the bankruptcy proceeding and the relation of the Corporation to the other group members and their creditors (R. 2234-5):

"The Corporation was sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. *Consolidated Rock Co. v. DuBois,* 312 U.S. 510, 522. It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty.

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A tax return is an historical document relating to the past. This return related to a period when the affiliation existed. All fiduciary duties with respect to matters arising during the relationship continue during the winding up period, and are 'as sacred and inviolable after as before the expiration of its term.' It would be ridiculous to say that a fiduciary who performs an act winding up matters which relate to the affiliation period may exact payment merely because the relationship has technically terminated. If Corporation had required tribute as a condition of its cooperation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors. Equity will not permit a recovery as a substitute for a bargain which would have been unfair."

Here is a plain statement that the source of the obligation to sign the returns was the relation of the parties and not the Revenue Acts. On rehearing the court affirmed its position in that respect and said (R. 2369):

"In our decision we discussed the obligations of a holding company to its subsidiary and creditors, and its duty not to attempt to appropriate to itself an advantage which the tax laws give the subsidiary." (Emphasis supplied).

The petitions complain of the phrase "an advantage which the tax laws give the subsidiary." The meaning, however, is clear: that the consolidated returns naturally operated to reduce the taxes of group members having income or, to use the language of the court, "the tax laws give the subsidiary" an advantage. All the arguments of petitioners are based on this tax advantage. The court did no more than to acknowledge what petitioners insist upon. Petitioners take a single phrase from two long opinions, distort its meaning, twist it into a ruling of the court in complete disregard of the true basis of decision and then ask review of this imaginary ruling. The fact that petitioners must go so far to find an argument is some measure of the merit of these petitions.

The other grounds offered in support of the writ are equally unsubstantial. The Corporation claims there has been some abuse of the decision in *Ecker v. Western Pacific Railroad Corporation*, 318 U.S. 448 (1943), presumably on the theory that the reorganization plan was too harsh. This is both untrue and irrelevant. In this if in no other railroad reorganization, the new securities have not had, generally speaking, the values assigned to them by the plan and in any event the purpose of this proceeding is not to review the *Ecker* decision. The Corporation says, too, that the court below unduly restricted the judicial power of the Federal Courts—this because the opinion on rehearing emphasizes the difficulty of making an ex post facto bargain for parties in a fiduciary relationship, when there was nothing to sell and when everyone concerned was subject to the jurisdiction of the reorganization court. These difficulties are not unreal, particularly since this Court has held that

in a reorganization proceeding nothing will be paid for "strategic position" or "sheer nuisance value." *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 131 (1939). There are complaints in the petitions about findings of fact by the Court of Appeals and the interveners add objections to the conclusions expressed on fiduciary obligations and the failure of the opinions to cite state decisions. The fact is that the Court of Appeals found no new facts. The opinions, as in every other case, recite the facts the record discloses, facts petitioners have characterized as "few", "simple" and "wholly undisputed" (the Corporation's District Court Brief p. 1). This can hardly be error. Moreover, the opinions fully disclose the basis of decision and the fiduciary duties of the parties were correctly stated. There is no reason here for certiorari.

Certainly there is no reason here for a second certiorari. The phrase about the "advantage which the tax laws give the subsidiary" to which petitioners object was in the record last term (R. 2234); the same argument was then made about a perversion of the purposes of Congress in permitting a subsidiary to obtain an advantage through consolidated returns; the same contentions were advanced about findings of fact by the Court of Appeals; the same objections were offered to the decision below as to the fiduciary obligation of the parties. Each of these points has been extensively briefed (The Corporation's 1952 Brief pp. 62, 146, 76) and heard at length in this Court. Petitioners have nothing new to say and there is no reason to hear them again.

3. There Has Been No Injustice to Petitioners.

Petitioners complain at length about the work of the courts below. They are less articulate in explaining why there is merit in their claim and why, if the claim has merit, they have been unable anywhere to obtain a judgment. The arguments advanced by petitioners in support of their position are speculative, conflicting, novel and unsupported by any precedent.[5] The objections to the claim, on the other hand, are clear, firm, numerous and, as the opinions below explain, insurmountable. No one denies, for example, that what was done in connection with the 1942-4 Western Pacific taxes was exactly what had been done by the Western Pacific group for twenty-five years under the direction of the Corporation itself (R. 1258-9), exactly what the Treasury expects will be done (T.D. 5086, I.T. 3637, I.T. 3692), exactly what the S.E.C. requires public utilities to do (Rule U-45(b)(6)), exactly what the Federal Trade Commission (Sen. Doc. No. 92, Part 72-A, 70th Cong., 1st Sess., p. 478)

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[5]The arguments of petitioners *assume*, rather than prove, their position. Petitioners stress the dual employment of the Corporation officers, an alleged fiduciary duty in favor of the Corporation and allegations that the Corporation was dominated by the trustees. These arguments, as the courts below pointed out, beg the question. Duality, domination and fiduciary obligation are important only if the Corporation failed to obtain something to which it was entitled. The courts below have concluded, and correctly, that the Corporation was entitled to nothing as "tribute" from the other group members. Since the Corporation lost nothing to which it was entitled, it makes no real difference how or by whom the tax transactions were handled. The fact is, however, that the trustees did not dominate the Corporation and all the Corporation officers so testified (R. 743-4, 1011-6, 1046, 1126, 1136, 1143). The fiduciary duty between the parties did not run to the Corporation but from it in favor of the other group members and their creditors. *Consolidated Rock Co. v. DuBois*, 312 U.S. 510 (1941). And the so-called duality was the normal arrangement in an affiliated group, an arrangement made by the Corporation itself. (R. 1839, 1845, 1852-3, 1738).

and the Congressional committees (Hrgs. on S. 1725, 74th Cong., 1st Sess., p. 255) have said was right, and exactly what the American business community has always thought proper (S.E.C. Release No. 53, dated Nov. 16, 1945). No one denies that this claim is a speculation brought to life by the intervening stockholders who purchased their shares at nominal prices (R. 1147-55, 1642-3, 1905-7, 2102) and obviously for litigating purposes. No one denies that no effort was made to present the claim in the reorganization proceeding (R. 2372), although the very purpose of that proceeding was to bar all unapproved claims (R. 274). No one can deny that if the claim were allowed the Corporation would be preferring itself to the unpaid creditors of its bankrupt subsidiary, creditors to whom it owed fiduciary duties. Nor can anyone deny that, if the question were reached and before the claim could be allowed, petitioners would have to overcome the bar of the reorganization and the statute of limitations. These circumstances hardly suggest that the decision below was erroneous.

Although petitioners are unwilling to say it plainly, their argument is not and never has been more than this: "Without us there could have been no tax saving; therefore we must be paid." This is a simple syllogism and it has failed not because the courts below have been unable to understand it; but rather because they have understood it only too well.

Petitioners to the contrary notwithstanding, the law of unjust enrichment does not say that everyone who participates in a transaction must inevitably take some share of the proceeds. It all depends. In a case such as this, where the claim for compensation is made ex post facto and with

respect to a closed transaction honestly and openly conducted, the presumption is against rather than in favor of the claim. Petitioners, as the courts below have discovered, have not succeeded in overcoming this presumption. Moreover, compensation is never awarded except where the enrichment is unjust, that is, where property has been transferred or a service provided in the reasonable expectation that payment would be made. Here there was no expectation of payment; no property transferred; no service provided. And since the Corporation had no income against which the loss could be offset, the use of the loss in the tax returns resulted in no disadvantage or damage to the Corporation.

In the final analysis the tax saving resulted from the operation of the tax laws on the determination by the bankruptcy court and this Court that the stock of the operating company owned by the Corporation was worthless, a determination, incidentally, which the Corporation vigorously opposed. With that conclusion of record, there was nothing between the trustees and the tax result here achieved except the signature of all the members of the Western Pacific group, including the Corporation, to the consolidated returns. In strict accordance with twenty-five years of past practice the consolidated returns were signed and filed. The Corporation did nothing to bring about the tax result except to provide a signature. The courts below are emphatic in the conclusion that the Corporation, for reasons of good management, for reasons of fiduciary obligation to its subsidiary and its unpaid creditors, and for reasons of equity arising out of the bankruptcy proceeding, could not set a price on this signature. Moreover, the returns were needed in order to preserve the trustees' credits and carryovers.

To compel the trustees to pay unnecessary taxes would have been a gross abuse of the Corporation's management and bankruptcy obligations, an abuse which the reorganization court would never for a moment have tolerated.

Petitioners talk about fairness, but no one need be deceived. Petitioners here seek a judgment of several million dollars not because they have any claim to the money but because they say they could have compelled the trustees to make an equal or larger payment in taxes to the United States. No court has ever approved and respondents think it unlikely that any court will ever approve any such claim. Courts listen to rights, not to threats.[6] The Corporation had no rights. It had nothing to sell. It wants pay not because of what it did for the trustees but because of the harm it might have done them. The courts below wisely and correctly concluded that the special circumstances of this case provide special reasons for following, rather than abandoning, the uniform and approved practice as to the allocation of rights and duties under consolidated returns.

The judgment below follows the accepted practice of the business community, the settled practice of the Western Pacific group and the judgment of every informed person who has considered the problem of rights and duties under consolidated returns. That judgment can hardly be said, therefore, to be in error. Since there has been no injustice

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[6]From the outset, there has been in this case a suggestion that a bargain should have been exacted by the Corporation or, as counsel for the interveners put it on the motion for intervention, "* * * what the directors should have done, may it please the Court, is to have forced an apportionment by agreement of the tax loss from the subsidiary companies before permitting the use of the loss belonging to holding without any benefit to its stockholders." (R. 332). The court below characterized this position as a demand for "tribute" (R. 2233-5).

to petitioners, since this case presents none of the traditional reasons for certiorari relief, and since, in any event, the case has already once received the careful attention of this Court, it seems clear that the pending petitions should be denied. Litigation, as the saying goes, should have a place to end.

Dated: November 23, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 441

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS J. duP. BAYARD, RECEIVER,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

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In the Supreme Court of the United States

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Respondents.

Reply Brief in Support of Petition for Certiorari

The refrain of respondents' brief is that it is somehow unfair to ask the Court to review the case, the record being the same as in No. 150, 1952 Term, and that it would be unprecedented for the Court to do so. Respondent proceeds as if petitioner were seeking a rehearing of an adverse decision by this Court!

When this Court reversed No. 150, it did not approve the judgment below on the merits. On the contrary, that judgment was disapproved by the only Justice who expressed an opinion on the merits—Mr. Justice Jackson. This Court felt that the en banc issue warranted a reversal and thought it unnecessary to go further. But it not only vacated the order below denying leave to reinstate the petition for rehearing en banc, it also vacated the denial of a

rehearing, and thereby it opened up the judgment for later review in the event a rehearing should again be denied (Mandate, R. 2322). In remanding the cause it envisaged the possibility, if not the probability, that a rehearing en banc would be granted, that the whole court below would then decide the cause for petitioner, or, if it should sustain the panel, would at least give this Court the benefit of a clearer and sounder exposition of reasons, and thus in either event simplify this Court's task. It is not unusual for this Court to remand so that it may obtain the considered view of a lower court, and thereafter to grant certiorari again (Cf. *U. S. v. Ballard,* 322 U.S. 78, 88, and *Ballard v. U. S.,* 329 U.S. 187).

Instead, the consequences of the remand were abortive. The court below, en banc, declined to give consideration either to the merits of the cause or to the merits of granting a rehearing. And the panel, truncated by the non-participation of one of its members, the one who had voted for petitioner before, declined to reconsider the case. The questions that this Court judged important enough to warrant a writ of certiorari last year, but which it did not thereafter reach, are thus again presented—this time aggravated and added to by the latest opinion of the truncated panel rendered on denying rehearing again.

Apart from the foregoing, the gist of the respondent's opposition may be placed in three categories.

I.

THERE ARE IMPORTANT FEDERAL QUESTIONS

Respondent asserts that a judgment determining the legal consequences attaching to the filing of consolidated tax returns under federal tax laws raises no question of federal concern. That is little short of amazing. If that were not a federal question, it would certainly be an important question of equity jurisprudence, arising in an exclusively federal context and equally within this Court's certiorari jurisdiction. As has been said, "* * * foreign corporations, acts committed in other states, federal bankruptcy proceedings and federal tax rulings are scrambled in the legal situation * * *." (Jackson, J. in 345 U.S. 247 at 275, 276.)

Moreover, the court below has pitched its decision on a construction of the federal tax statutes, which it then carried to an extreme in its latest opinion, which respondent largely tries to ignore.

In an attempt to minimize the tax questions involved, respondent asserts that petitioner's views are contrary to those of the Treasury, the S.E.C., and other agencies (Br. pp. 12, 14, 18). The same claims were made in respondent's main brief in No. 150, last term, and were shown to be pretentious error in our brief in reply (at pp. 4 to 6).

The court below also supported its decision by invoking supposed requirements of federal railroad reorganization, by declaring itself helpless to decide otherwise because of alleged constitutional restraints on its power as a court, and by invading the field of fact finding, and its decision ignored the equities arising from a misuse of this Court's decision in *Ecker v. Western Pacific Railroad Corporation,* 318 U.S. 448. As to the latter, respondent, using the term "abuse of the decision" in the Ecker case even goes so far as to reply that such an abuse is "irrelevant" (p. 16).

II.

ON THE MERITS RESPONDENT RESTS ON ASSERTIONS CONTRARY TO ELEMENTARY PRINCIPLES

The second category of respondent's argument consists of Olympian assertions of propositions of fact and law so thoroughly exploded that we had thought they had been abandoned. Thus it says that petitioner "lost nothing" (Br. 18), that it had no income and therefore its loss had no tax utility to it (Br. 9), that petitioner had "nothing to sell" (Br. 16), that its claim is a demand for "tribute" (Br. 18), an exaction of "nuisance value" (Br. 17). But the usability of the loss as an offset for tax purposes gave it value; the fact that the market for it was restricted detracted nothing from its value to one in a position to utilize it; and there is no obligation to give to another a legal opportunity or avdantage just because its owner may not be able to utilize it himself. To refuse to give a gratuity may not be stigmatized as capitalizing mere

nuisance value. It does not constitute a blackmailing transaction which offers to forego doing another injury if bought off.* These principles are covered in our main brief in No. 150, Oct. Term 1952. (And cf. Jackson, J. in 345 U.S. 247 at 276, 277, where they are taken to be elementary).

Respondent's basic position is also reflected in its response to our statement that the tax result was accomplished by its taking over and managing petitioner's affairs for its own benefit. It vigorously asserts that its domination of petitioner and the existence of a fiduciary obligation to petitioner, and the like, are not "important"; it stands bluntly on the proposition that it "makes no real difference how or by whom the tax transactions were handled" (Br. 18), on the theory that petitioner lost nothing to which it was entitled. This, of course, is the doctrine laid down by the court below, and we submit that it alone calls for review by this Court.

While respondent also denies that it achieved the tax result by dominating and using petitioner's officers, in support of the denial it cites statements in the opinion of the court below. This is an effort to turn a vice into a virtue, for these are the statements we point to as constituting an improper invasion of the fact finding function. Respondent even asserts, disingenuously, that "The District Court reached the same conclusion" (Br. p. 4). On the precise question, the District Court said explicitly that the preponderance of the evidence supported petitioner's contention of domination and control by respondent, and it affirmed that "there is no question" that respondent conducted the tax proceedings and achieved the tax result through control of petitioner (see our Petition for Certiorari, pp. 35, 36).

There are references to alleged "past practice" (Br. pp. 4, 8, 20), a spurious argument for reasons noted in our petition in No. 150, last term (p. 20 of the appendix to our present petition for

*Respondent even asserts that "The Corporation did nothing to bring about the tax result except to provide a signature" (Br. 20). But the tax savings resulted from the conjunction of two elements: (1) joinder by petitioner in consolidated returns, and (2) the use therein of something belonging to petitioner, its loss.

certiorari). There are assertions about "unpaid creditors," not in reply to, but in disregard of, what we said at pages 19-22 of the present petition. If the one former creditor of respondent who was not paid in full (other than petitioner) were to receive from the tax savings enough to make up the difference, there would still be left $13,705,839 plus interest.

Finally, respondent depreciates the intervening stockholders (petitioners in No. 463), calling them speculators. But the Corporation itself, petitioner here, represents over 4700 stockholders (R. 659), the bulk of whom have owned their shares for years, being the very people who put up the $75 million that built the defendant railroad. They should not be denied their rights nor should a windfall be bestowed upon stockholders in the respondent railroad, merely because of claims, founded or not, about the interveners. The issue is a false one, and the argument is but part of the smooth self-righteousness by which respondent seeks to escape its just obligation.

III.

THE CASE IS RIPE FOR FINAL DECISION

This case is now ripe for final decision by this Court. Respondents express solicitude for the Court in having to receive further argument, written and oral. But if certiorari is granted, petitioner will mainly rest on the briefs filed in No. 150 last year as supplemented by the present petition for certiorari herein. We stand ready to assist the Court by oral argument, but if the Court should prefer to rely primarily on the arguments made in December, 1952, although they were not heard by the present Chief Justice, it of course has the power to place the cause on an appropriate docket.

We submit that the judgment should be reversed. Upon reversal there is no need for the cause to be remanded for further proceedings in any court below to determine who should prevail. While the Court of Appeals has intruded on the fact finding function, the facts it purported to find are material only upon one of its theories

of the case, and that theory is unsound. On the basic principles and on facts found by the District Court and never questioned, petitioner should recover.

The only remaining question is how much. A decision for petitioner on the merits would leave open, as we anticipate, merely a mathematical computation in the light of the governing principles declared by the Court. Those principles are simple and our views can be presented in short compass, upon the granting of certiorari.

CONCLUSION

We respectfully submit that the petition for certiorari should be granted and the judgment reversed with directions to enter judgment for the petitioner.

Dated: San Francisco, California, December 1, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 463

MERLDITH H. METZGER, HENRY OTTENHEIMER and J. S. FARLEE & CO., INC., *Petitioners*,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD., *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

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THE STANDARD REALTY AND DEVELOPMENT COMPANY and
DELTA FINANCE CO., LTD.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. By its previous grant of certiorari on all issues without qualifications, this Court plainly held the merits as worthy of review as the en banc question. Respondents strain to divest this holding of its clear significance. According to respondents (Br. 11), this Court reversed itself when, in its previous decision, it failed to reach the substantive issues; "apparently", say respondents, the Court thought the merits deserved no consideration.

This far-fetched inference is belied, however, both by what this Court did and what it said. The majority of the Court did not reach the merits because it remanded the case for the procedural reason that the Court below, by not

properly entertaining the petitions for rehearing en banc, had failed to exhaust its appellate functions; hence the merits were not yet ripe for decision by this Court. The dissenting Justice, who saw no need for a remand, necessarily turned to the substantive issues and, having considered them, voted for reversal. This he could do because, as the majority opinion carefully stated, the en banc question was to be reviewed only "among other things" (345 U. S., at 250). The review on the merits is certainly no less appropriate now than when this Court granted it last year.

2. Respondents' contention that a second grant of certiorari under these circumstances would be "unprecedented" is simply wrong. Thus in the recent *Spector Motor* cases, this Court initially granted certiorari to review the constitutional validity of a state statute which the Court of Appeals had sustained. After full briefs and arguments, this Court, without reaching the merits of the constitutional question, remanded for the procedural reason that the scope of the statute should first be determined by the state courts; *Spector Motor Service* v. *McLaughlin,* 323 U. S. 101 (1944). After that determination was made, this Court again granted certiorari and settled the constitutional issues on the merits; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951). The analogy of these proceedings to those at bar needs no elaboration. See also the repeated grant of certiorari, on the same record, in *S. E. C.* v. *Chenery Corp.,* 318 U. S. 80 (1943), and 332 U. S. 194 (1947).

3. The other grounds urged by respondents against allowance of the writ are equally unpersuasive.* While the facts of this case may be "unique", the principles of law on which it was decided below are broad and of far-reach-

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* We pass over respondents' wishful assertion (Br. 18, 19) that "no one denies" a series of suggested arguments which actually have been fully rebutted (our reply brief, pp. 8-19, in No. 160, last term).

We also pass over the vast liberties which respondents (Br., 4-6 et passim) take with the facts of this case, except to note that not

ing importance. Thus the Court below held, in effect, that *every* corporation with a tax loss is *required* to join in consolidated returns with its profitable affiliate in order to minimize the latter's taxes. Although respondents profess to find no such ruling in the decision below, the language of the Court is clear:

> "Under this state of facts [i.e., the parent having a tax loss, the subsidiary a taxable profit, and both having common officers] these officers had a positive duty to make use of the loss as they did, that is, to offset the income of members of the affiliated group with deductible losses of other members. If the positions of the corporations were reversed and the subsidiary had a loss and the parent had income, the officers would have been obliged to file consolidated returns to enable Corporation to make use of the loss." (R. 2233)

The breadth of this and similar holdings (see R. 2234, 2369) is such as to reach practically every group of affiliated corporations in this country and totally to subvert the statutory principle that the filing of consolidated returns is a privilege, but not a duty; *Duke Power Co.* v. *Commissioner*, 44 F. 2d 543, 545 (C. C. A. 4, 1930), cert. denied 282 U. S. 903. The New York case cited in our petition (p. 16) is but one outgrowth of the decision below; a rich harvest of similar litigations is bound to follow if that decision should remain unreviewed and unreversed.

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one of respondents' "fact" statements rests on findings of the trial court. Respondents' references are to "findings" of the Court of Appeals, to stray bits of testimony and to occasional remarks of the trial judge made during the trial. These references only serve to emphasize the necessity of proper findings of fact by the trial court in accordance with Rule 52(a) F. R. C. P.

Concerning, finally, respondents' personal attacks upon petitioners (Br. 9, 19), it is enough to say that they are based upon purported evidence which the trial court properly excluded. The irresponsible charge that petitioners purchased their shares "obviously for litigating purposes" (Br. 19), founders on the fact, demonstrated by respondents' own offered evidence, that petitioners became stockholders, respectively, in July, 1942 and in January and February, 1944 (R. 1905, 2102-3), long before the first of the consolidated returns here complained of was filed on July 15, 1944, and years before this litigation or its predecessors stockholders' action was instituted.

4. Also misleading is respondents' assertion (Br. 11-12) that the case turns only on state law principles of "unjust enrichment". Whether respondents' retention of all of the $17,000,000 benefit procured through the use of plaintiff's tax credit is "unjust" to plaintiff, depends on the federal question whether, as the Court below said, "the tax laws ordained" this advantage to fall to respondents (R. 2371) or whether, in the words of Mr. Justice Jackson, "the intention of the statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one which sustained no loss."

5. There is, finally, no merit whatever to respondents' argument (Br. 12) that these tax questions should not be reviewed because the Treasury Department is not a party. The Treasury has no interest; the case does not involve its right to collect taxes. The case does involve the allocation between private parties of the burdens and benefits arising from the payment or non-payment of certain taxes. Just such an issue was presented in *Phillips-Jones Corp.* v. *Parmley,* 302 U. S. 233 (1937), discussed in our petition (p. 16). The absence of the Treasury in that case did not deter this Court from granting certiorari to do justice between the parties in accordance with the spirit of the tax laws. The present petitioners ask for no more than the same measure of justice.

Dated: December 3, 1953.

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In the Supreme Court of the United States

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Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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